Energy Projects & First Nations in Canada:

Rights, duties, engagement and accommodation

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The Lexicon

Indigenous People

Band

Indian

Reserve

Natives

Aboriginal

Status Indian

Inuit

Innu

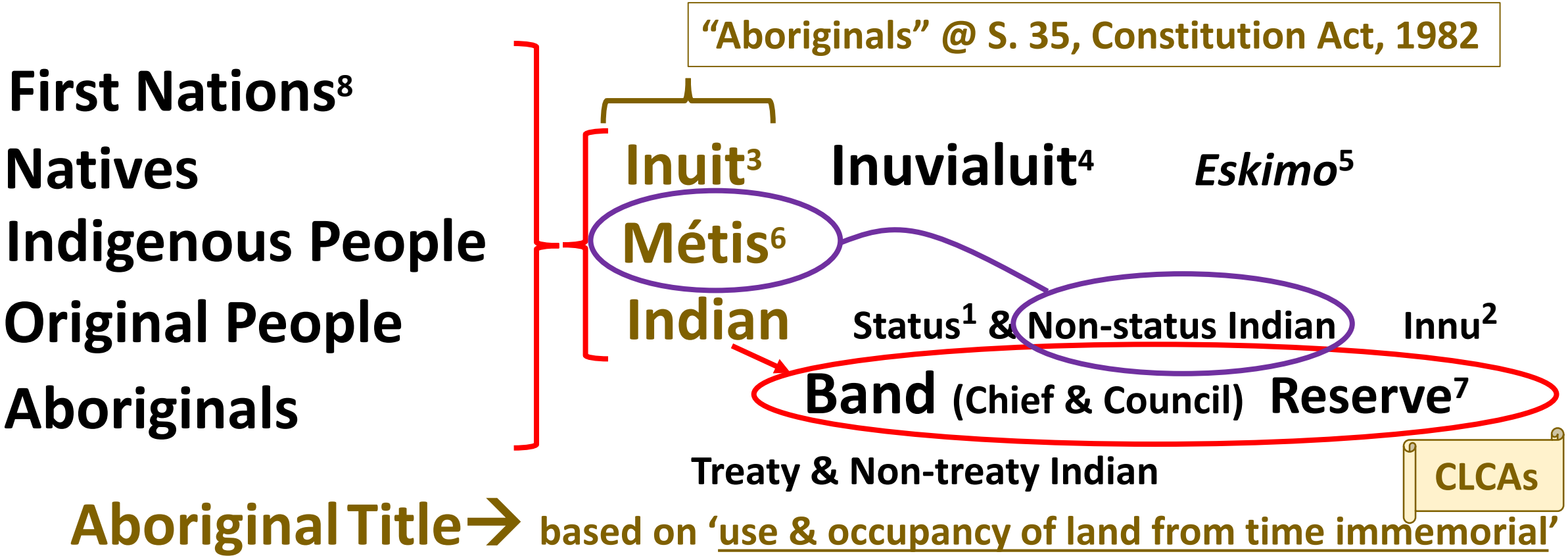
Eskimo

Métis

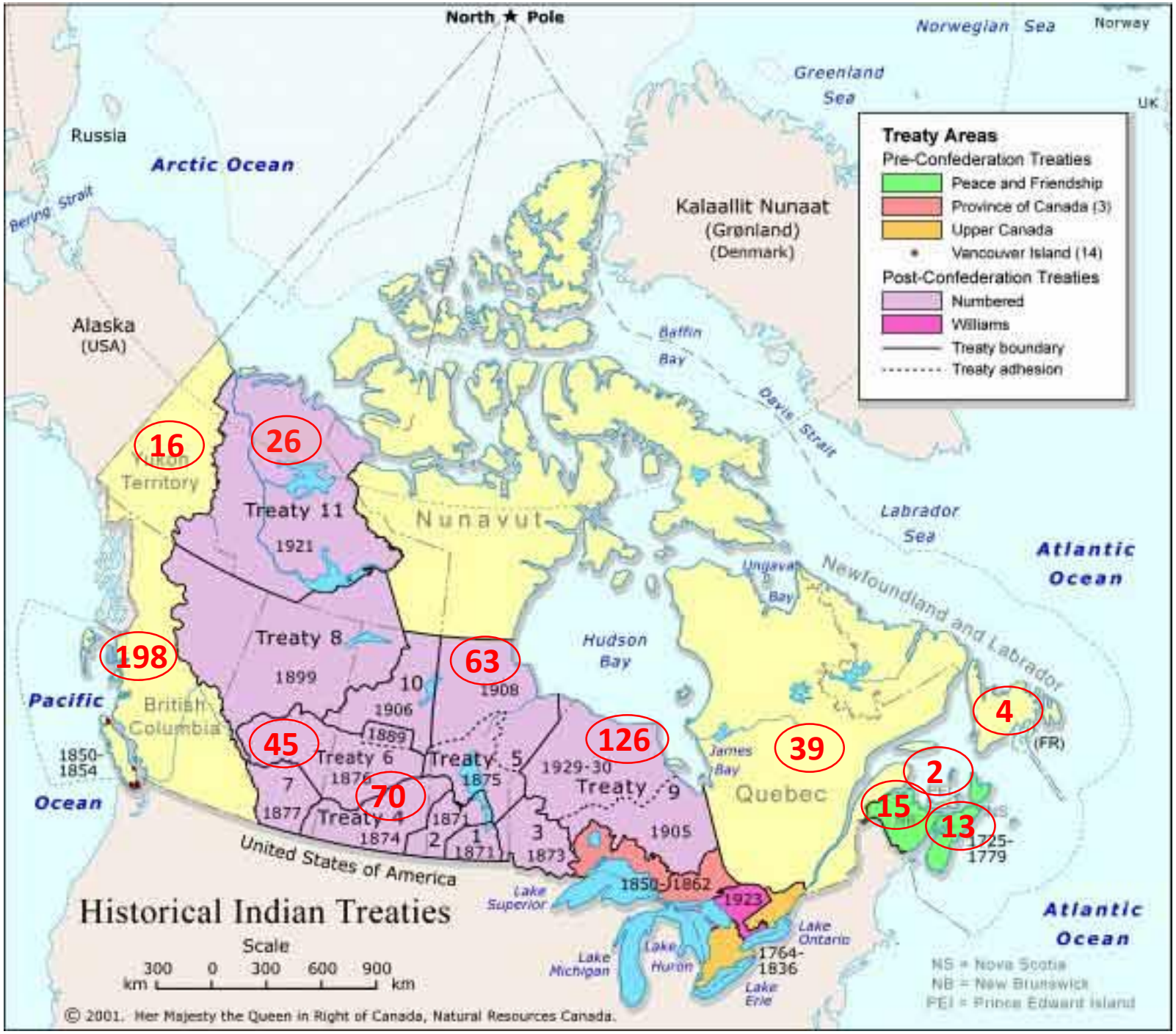
Inuvialuit

First Nations

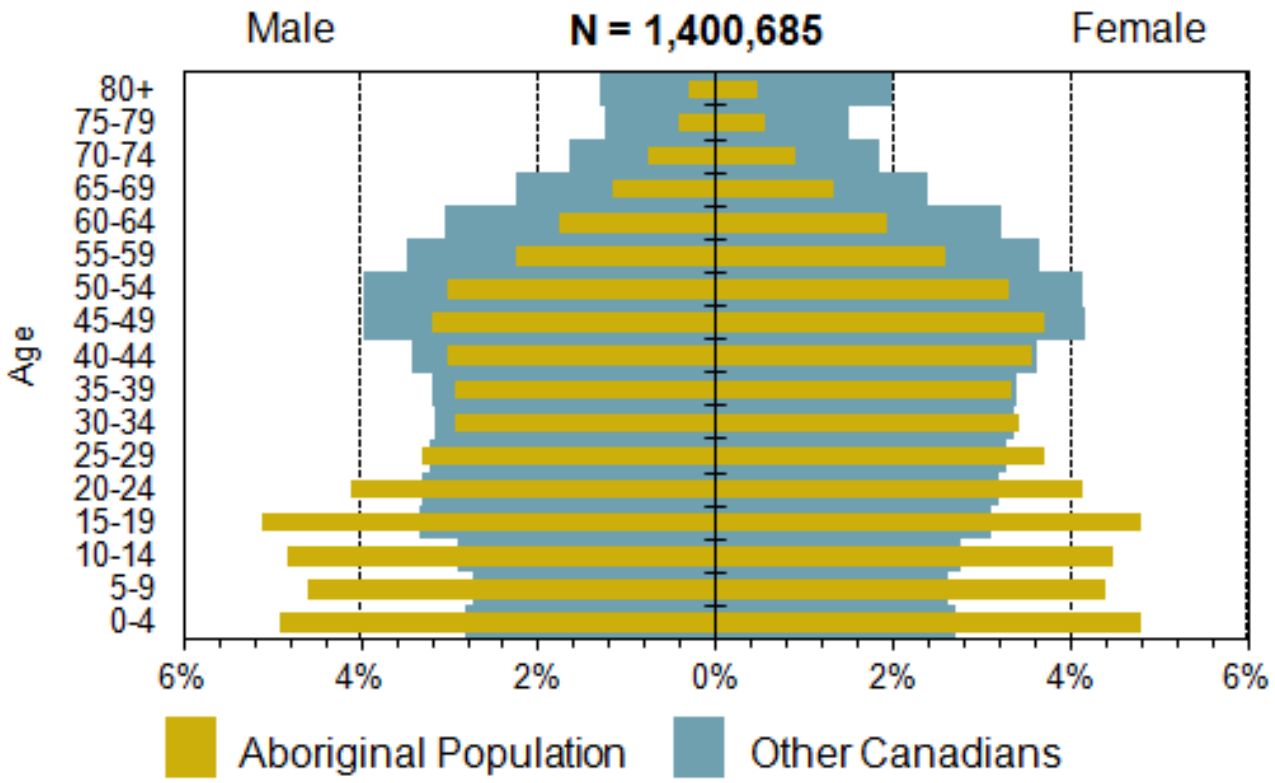
Original People

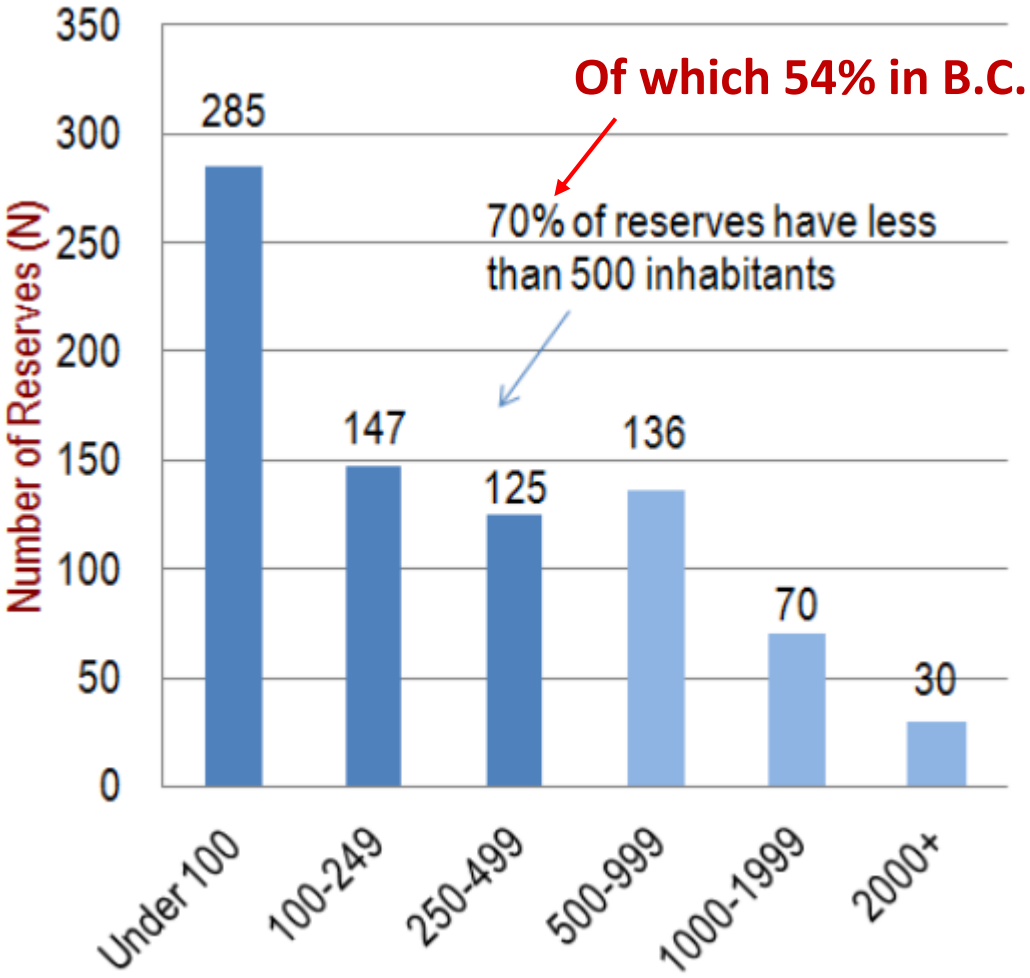


1. Whether registered as an Indian under the ***Indian Act*** *(1876)*
2. Indian First Nations in northern Quebec
3. Aboriginals of northern Canada; = 'people' in Inuktitut
4. Inuit of Western Arctic
5. People of Arctic, now considered offensive; 'raw meat eaters'
6. Mixed Indian (Ojibway, Cree) & European (French, Scottish); **SCC** Decision 14/4/2016 defined as "Indians" [*Constitution Act 1867* s.91(24)]
7. A discrete tract of land, legal title with Crown for benefit of an Indian Band
8. Current Politically correct replacement for 'Indian', with no legal definition (1987 origin)
9. **Comprehensive Land Claim Agreements**: 23 self-government agreements negotiated post 1973; evolving & problematic



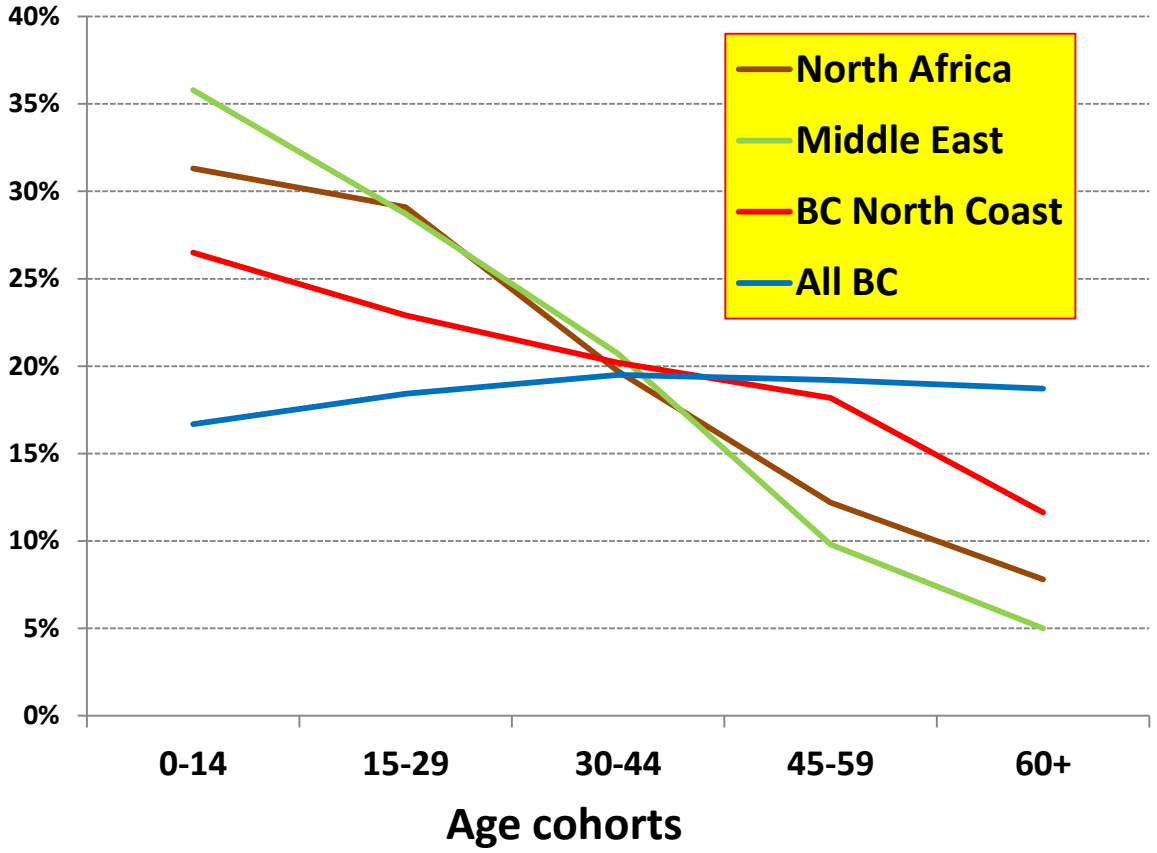
- 500 yrs ago, 100% of Canada occupied by ~ 2 mm First Peoples (Indians, Inuit)
- Today: Reserves = 0.03% of land; Métis Settlements = 0.05%
- 2011: First Peoples and Métis ~ 1.4 mm, or 4.3% of Canadian population; fastest growing demographic; 50% <25yrs
- 52.6% live on ~800 Reserves & on Crown Land, rest mostly in urban areas
- **617** First Nations (Mohawk, Iroquois, Cree, etc); **198** in British Columbia, where mostly no existing Treaty.
- 40% of total aboriginal population live in B.C., AB & Sask.
- FNs range in size,

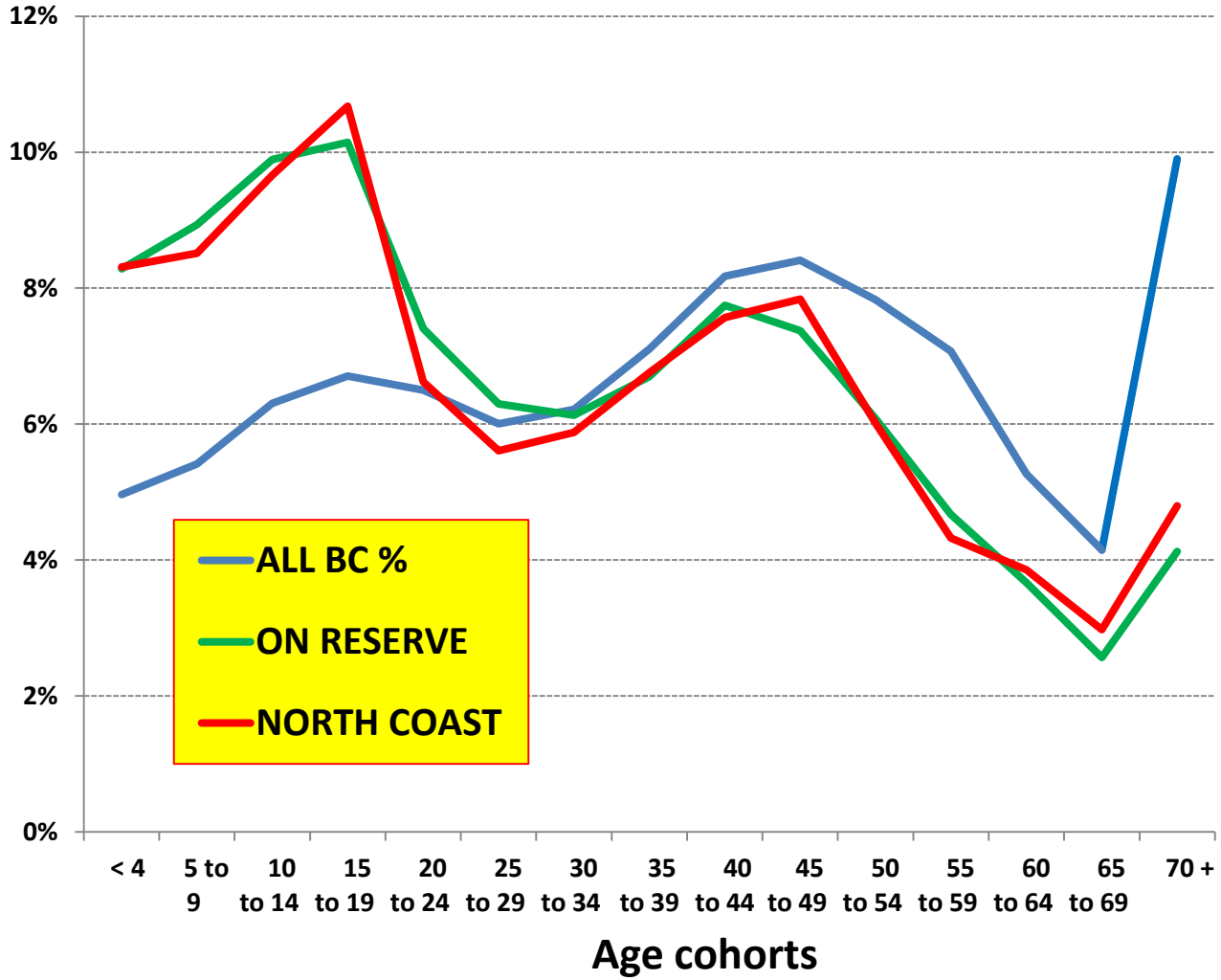




Aboriginal population fastest growing demographic in Canada;

Demographics Count
--Where the LNG hopes spring eternal…





Key Constitutional Principles pertaining to Aboriginal Rights

- Use and occupancy…time immemorial
- A 35(1) *Constitution Act* (1982) "aboriginal and treaty rights…recognized and affirmed"
- "Honour of the Crown" when acts of Crown could adversely affect FNs' rights & interests
- Crown's duty to consult and, where appropriate, accommodate.
- Aboriginal rights and title are collective rights/title, derive from continuous use and occupation of a certain area (hunting, fishing, ceremonial practices, traditions and customs…); not = fee simple ownership rights
- Crown can infringe on Aboriginal rights to balance other societal interests

The Duty to Consult

- *SCC Haida* 2004 held that Crown's duty to consult triggered when Crown
  - 1) has knowledge of *potential* existence of a right or interest, and
  - 2) contemplates conduct that *might* adversely affect potential Aboriginal or treaty right.
- The bar is very low to trigger duty; part of "process of fair dealing and reconciliation", the Crown must always act honorably.
- The regulatory and permitting process constitutes 'conduct' therefore triggers the Crown's duty.
- The level of consultation depends on strength of Aboriginal right or claim

Responsibilities of the Parties

- Duty can trickle down to Provincial Crown and to industry proponent but it remains the constitutional responsibility of the Crown.
- Consult with potentially-affected parties; keep detailed records on discussions, identify concerns and how addressed
- Aboriginals have reciprocal obligations to participate in consultation process in good faith, but process must be reasonably accessible and participation is meaningful.
- No duty on any party to agree or to require consent* or for veto-power over government decision-making.

*The notion of 'consent' is currently a contentious issue with the federal government's commitment to adopt and implement the United Nations Declaration on the Rights of Indigenous People (UNDRIP); requirement of "…prior, free and informed consent" (FPIC) is aspirational and can't supersede the Crown's responsibility. But many FNs may press for FPIC!

Accommodation

- Consultation may sometimes reveal a duty of the Crown to accommodate Aboriginal rights.
- Avoiding, minimizing & mitigating adverse effects, in some cases even economic or financial accommodation but this remains undefined.
- Where a Crown decision might adversely affect unproven Aboriginal rights, Crown must balance concerns between the asserted right and societal interests

Recent Significant Canadian Case Law

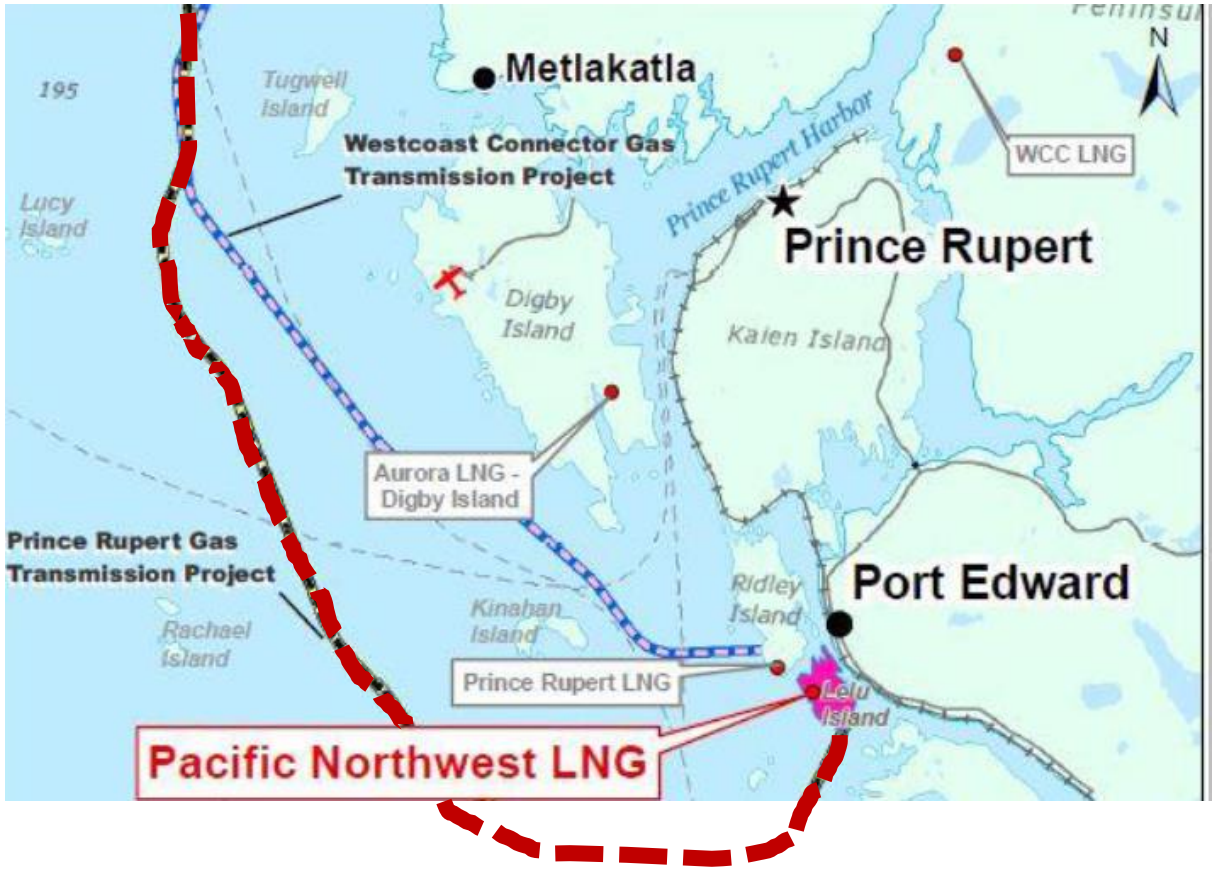
- *Tsilhqot'in v. British Columbia 2014 SCC 44* & *Grassy Narrows First Nation v. Ontario 2014 SCC 48* clarify Provincial gov't's laws and applicability.
- *Tsilhqot'in* is First finding of Aboriginal Title on a relatively small part of 1700 km^2 in B.C., confirmed the 3-part test, 1) occupation, 2) continuity of occupation & 3) exclusivity of occupation.
- But Aboriginal title is not absolute; Prov. can still approve development provided it has obtained FN consent or government can infringe title where it can demonstrate that the infringement is justified; 1) must have met duty to consult & accommodate, 2) substantial and compelling purpose, and 3) infringement is consistent with government's fiduciary duty to Aboriginal groups.

The Case of Petronas's Pacific NW LNG Project

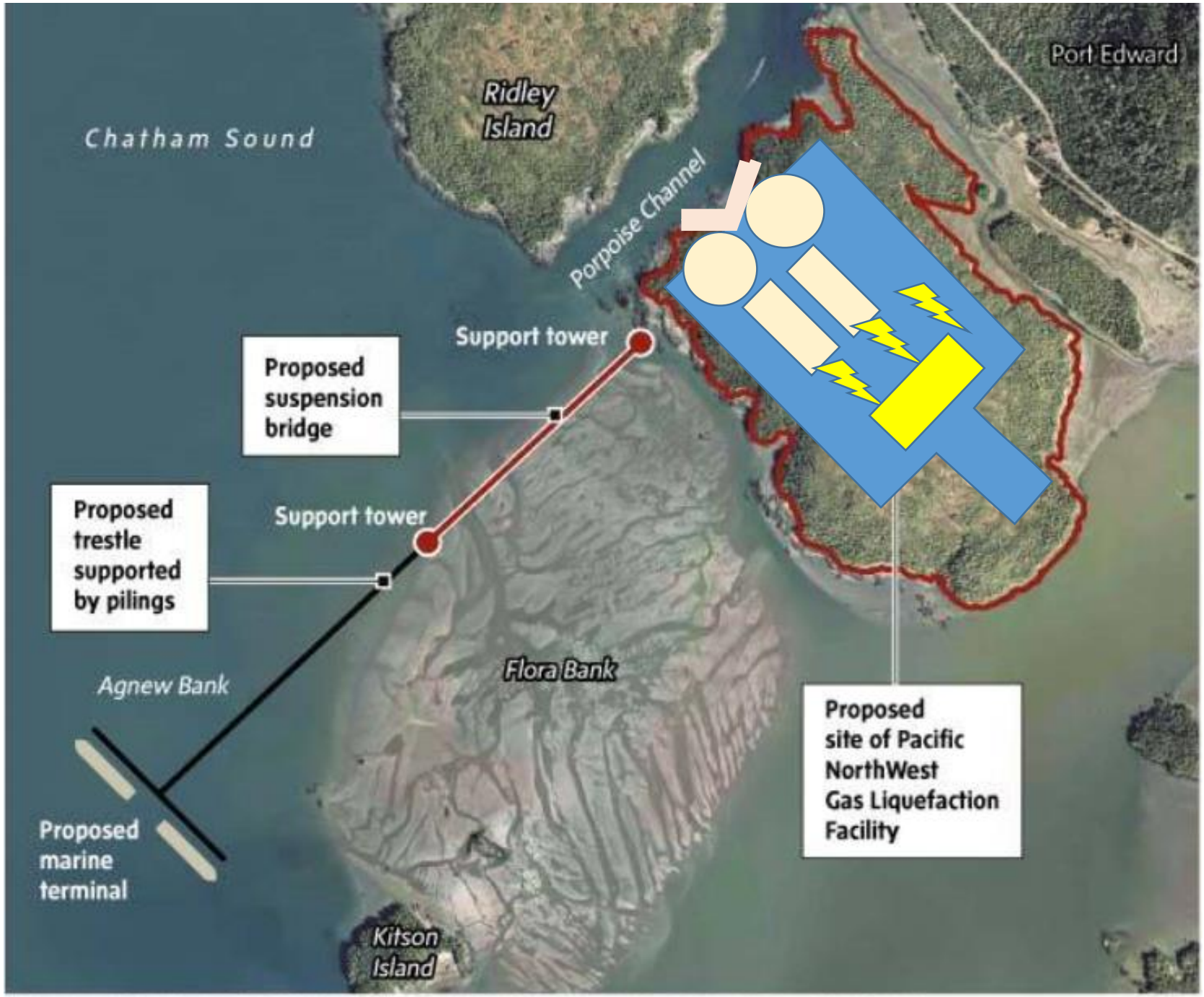
Approved but still held up

- $36 Billion Total Investment → 2021
- $2.5 B Annual Tax Revenues for all levels of gov't
- $2.9 B Annual contribution to Canada's GDP
- 40+ years, integrated with producer subsidiary in Montney Tight Gas basin, NE BC

- Prince Rupert Gas Transmission (TCPL); 900 km new pipe,
- Initial Capacity 2 Bcf/d
- 2 X 6 Mt trains start → 3 trains @ 19.2 Mt
- Partners: Sinopec, JAPEX, Indian Oil Corp., PetBrunei




Ridley Coal Export Terminal
Ridley Terminals
Port Edward
Lelu Island
Lelu Island
Skeena River Estuary
Flora Bank
Kitson Island Marine Provincial Park
Port Hardy, BC - Prince Rupert, BC
3D
Google



JOHN SOPINSKI/THE GLOBE AND MAIL) SOURCE: PACIFIC NORTHWEST LNG; GOOGLE EARTH; PRINCERUPERTGAS.COM

Pacific NW LNG Project & First Nations

The central ‘environmental/social’ issue is the impact of the jetty on sedimentation of Flora Bank and the impact on Eel Grass and salmon migration & therefore Aboriginal fishing…up the Skeena River.

The Aboriginal *Political* issue is Who has the right to accept the Petronas offer and accept this disruption?

Current status

- 16 FNs along pipeline route have signed benefit-sharing agreements
- Provincial Environment approval with 7 conditions
- Federal Env. Assessment Office & Minister's approval with >190 conditions (27 Sept 2016)
- Split between Elected Chief and Council of Lax Kw'alaams Reserve *versus* 'Hereditary' Chief's traditional off-reserve lands. Going to federal court.
- Other 4 Elected Band Councils signed term sheets for $1.2 Billion Impact Benefit Agreements
- FNs along Skeena River say they have not been adequately consulted (urged on by ENGOs)
- B.C. Premier Clarke, "Won't wait for unanimity"
- Petronas 're-pricing' the project costs

‘Good?’, ‘Right?’, ‘Effective?’ Practices & Guidelines

Most Natural Resource Industry Associations have protocols & guidelines for their members

IPIECA

Indigenous Peoples and the oil and gas industry

Context, issues and emerging good practice

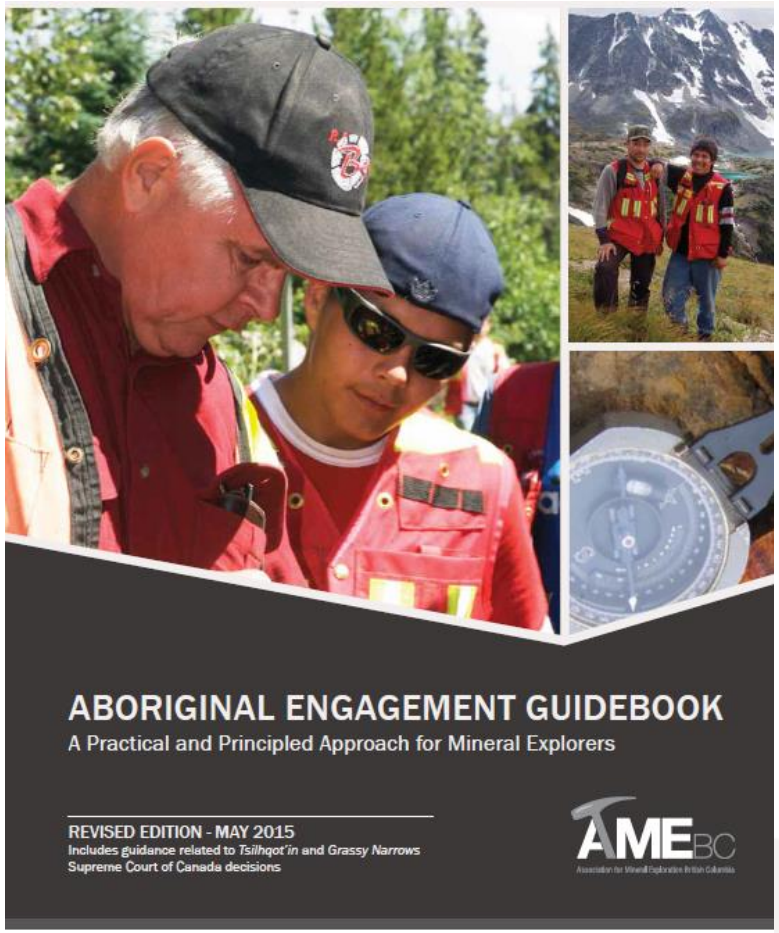
Social responsibility 2012

www.ipieca.org

Resource provinces have Directives, Orders on Aboriginal Consultation

- Provincial Crown's duty to consult is explicitly delegated to project proponents.
- Alberta
  - Ministerial Order to the Energy Regulator (AER) to ensure consultation through the Aboriginal Consultation Office (ADO) to ensure Crown's duty is fulfilled.
  - Established operating procedures for AER and ACO, including that all proponents contact ACO prior to submitting an energy application to AER, and "to provide information about the potential adverse impacts, if any, of (the project) on existing (Constitutional) aboriginal rights."
- B.C.
  - Guidelines, Engagement Logs, Procedures & specific guides for Environmental Assessment Process, mineral exploration, mines, clean energy projects

REFERENCES:
https://www.aer.ca/rules-and-regulations/by-topic/aboriginal-consultation
http://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations



Association for Mineral Exploration, B.C.

1. Work proactively with Aboriginal Peoples to build mutually beneficial relationships based on a shared understanding of our respective rights and interests.
2. Respect existing and asserted Aboriginal and treaty rights.
3. Respect Aboriginal communities' assertions regarding their traditional territories.
4. Respect the diversity of interests and cultures among Aboriginal Peoples and their respective relationships and views towards land and its resources.
5. Assist, to the extent reasonable, governments in carrying out their duty to consult and, where appropriate, accommodate Aboriginal Peoples regarding government decisions that may affect existing and asserted Aboriginal and treaty rights.
6. Ensure early and timely discussions with local Aboriginal communities regarding activities that may affect them.
7. Provide potentially affected communities with the information needed to encourage open, meaningful dialogue that addresses their interests and concerns.
8. Encourage the governments to carry out their duty to consult in a manner that reasonably balances existing and asserted Aboriginal and treaty rights with the interests of AME BC and its members.

Producer & Pipeline Associations' Guidelines

CAPP CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS

INDUSTRY PRACTICES

Developing Effective Working Relationships with Aboriginal Communities

CEPA canadian energy pipeline association | association canadienne de pipelines d'énergie

CEPA CONSULTATION FRAMEWORK

PRINCIPLES, OBJECTIVES AND GUIDELINES

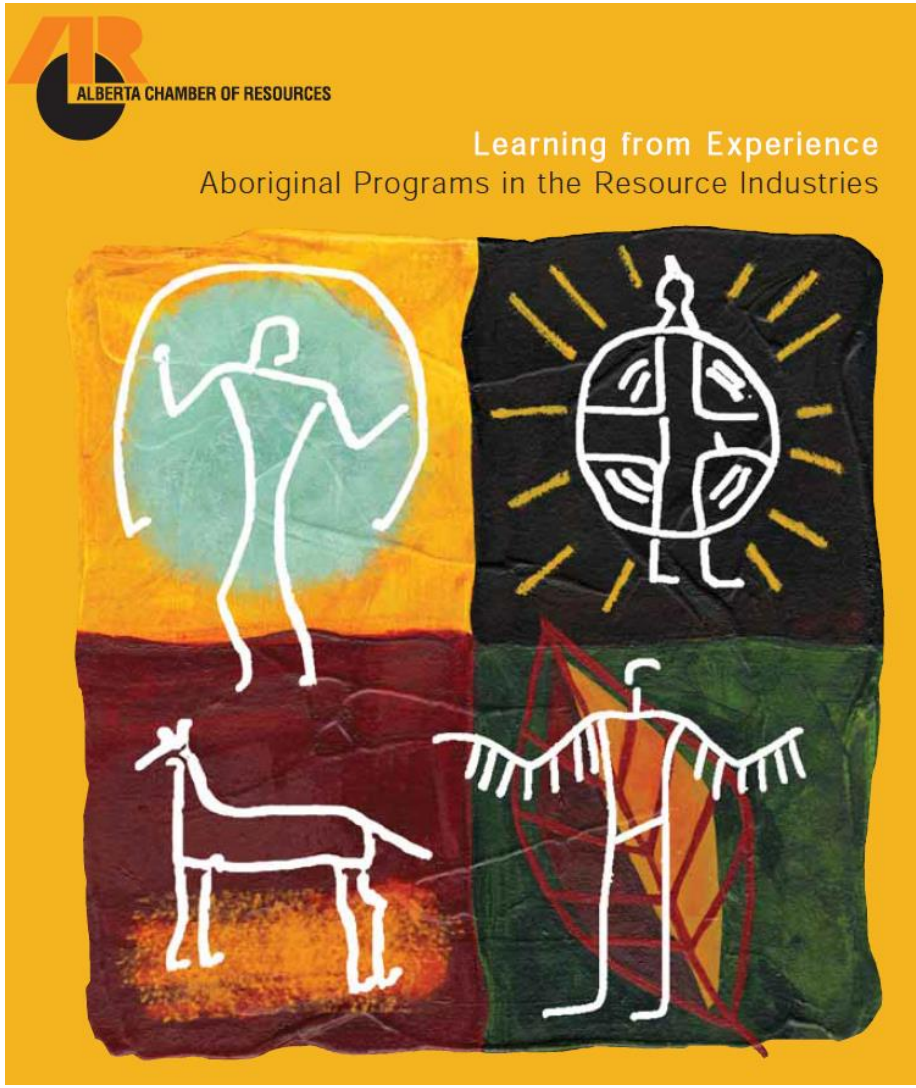
Alberta Chamber of Resources

No Single ‘Best Approach’

What works in one situation might not work elsewhere.

Common factors that contribute to success:

- Long term Relationships → Trust & Understanding
- Corporate commitment: How & Level conducted
- Early Engagement & Consultation
- Capacity & Willingness of Aboriginal community
- Sufficient Time and Flexibility



Advice on Effective Practice?

- Understand Law re Aboriginals, Crown's Duty & how it affects you.
- Work with the Crown, the Community/Band – and at CEO level to start.
- Consult Early & Often; keep records.
- Listen; above all don't simply declare what "you're going to do" on their land
- Learn about their culture, their interests, customs and history; develop a relationship of respect
- They're not interested in a few temporary construction jobs
- They want to build a lasting income stream on which to base a local economy
- Assume that in a country of equals, *they* <u>are</u> 'more equal than others'
- Engage with them as though they are fee-simple owners!

International Conventions & Articles

- **ILO Convention 169, Indigenous and Tribal Peoples Convention 1989;** *Article 15 (2).* In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) – ***Article 19***

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions **in order to obtain their free, prior and informed consent** before adopting and implementing legislative or administrative measures that may affect them.

(UNDRIP) - ***Article 28 (1)***

Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their **free, prior and informed consent**.

UNDRIP - ***Article 32 (2)***

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions **in order to obtain their free and informed consent prior to the approval of any project** affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.